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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA

4 v.

12 CR 152 (CM)

5 MICHAEL BINDAY,
6 JAMES KEVIN KERGIL, and
7 MARK RESNICK,

Defendants.

8 -----x

New York, N.Y.
July 30, 2014
2:35 p.m.

10 Before:

11 HON. COLLEEN MCMAHON,

12 District Judge

13 APPEARANCES

14 PREET BHARARA

15 United States Attorney for the
Southern District of New York

16 SARAH MCCALLUM

EUN YOUNG CHOI

17 PAUL MONTELEONI

ARIEL PLATT

18 Assistant United States Attorneys

19 LAW OFFICE OF JEREMY SPORN

Attorneys for Defendant Michael Binday

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JEREMY SPORN

21 GALLET, DREYER & BERKEY, LLP

Attorneys for Defendant James Kevin Kergil

22 ROGER STAVIS

23 ADAM FELSENSTEIN

24 MURRAY LAW, LLC

Attorney for Defendant Mark Resnick

25 JANEANNE MURRAY

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(Case called)

THE COURT: Good afternoon. Have a seat everyone.

This matter is on for sentencing under docket 12 Cr. 152, United States of America v. Mark Resnick, United States of America v. James Kevin Kergil, United States of America v. Michael Binday.

The defendants having been found guilty following a trial of a number of crimes. For Mr. Binday, one count of conspiracy to commit mail and wire fraud, one count of mail fraud, and one count of wire fraud.

Mr. Kergil of one count of conspiracy to commit mail and wire fraud, one count of mail fraud, one count of wire fraud, and one count of conspiracy to destroy records and obstruct of justice.

Mr. Resnick, one count of conspiracy to commit mail and wire fraud, one count of mail fraud, one count of wire fraud, and one count of conspiracy to destroy records and obstruct justice.

The conspiracy to commit mail and wire fraud count is a class C felony in violation of Title 18, United States Code, Section 1349. This crime carries a statutory maximum penalty of 20 years' imprisonment, three years' supervised release, a fine the greater of \$250,000 or twice the gross gain to the defendant or loss to identifiable victims other than the defendant, and a \$100 special assessment.

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1 Mail fraud is a class C felony in violation of Title
2 18, United States Code, Section 1341. It carries the same
3 statutory maximum penalty as conspiracy to commit mail fraud.

4 Count Three, wire fraud, is a class C felony in
5 violation of Title 18, United States Code, Section 1343. It
6 carries the same statutory maximum penalty as conspiracy to
7 commit wire fraud.

8 Count Four, conspiracy to destroy records and obstruct
9 justice is a class C felony in violation of Title 18, United
10 States Code, Section 1512(c) and (k). It carries the same
11 statutory maximum penalty as the other three counts.

12 In connection with today's proceedings, I have
13 received and reviewed a great deal of material. I have the
14 presentence reports for Mr. Binday, Mr. Kergil and Mr. Resnick.
15 Mr. Binday's and Mr. Resnick's were prepared by United States
16 Probation Officer Jemmard Thomas and Mr. Kergil's was prepared
17 by United States Probation Officer Rodger Flemen.

18 I have the government's initial sentencing submission,
19 which came in a fat, black binder, along with 14
20 separately-tabbed exhibits, some of which have subtabs, and
21 they include an affirmation or a declaration from Thomas W.
22 McDonald, Special Agent with the F.B.I.

23 I have sentencing submissions from counsel on behalf
24 of each of the three defendants, extensive written sentencing
25 submissions in most cases with letters and testimonials

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1 attached thereto.

2 I have the government's reply in support of its
3 sentencing arguments and its supplemental submission regarding
4 forfeiture, which has with it Addendum A and Addendum B.
5 Addendum A are some charts concerning trial evidence that
6 relates to the, quote, "scheme applications." Addendum B are
7 proposed preliminary orders of forfeiture as to specific
8 property and money judgments as against each individual
9 defendant, and a proposed order of restitution that the
10 government would like me to enter in the course of today's
11 proceedings.

12 Is there anything else I should have seen in writing
13 prior to today's proceedings from the government?

14 MS. MCCALLUM: Nothing from the government, your
15 Honor.

16 THE COURT: From defendant Bindow.

17 MR. FRISCH: No, your Honor.

18 THE COURT: From defendant Kergil.

19 MR. STAVIS: From the day following our presentence
20 memorandum, I sent a letter to the Court attaching an email.
21 That was July 15, 2014.

22 THE COURT: Mr. Ramil tells me I have it. Do I have
23 it?

24 THE DEPUTY CLERK: You do, indeed.

25 THE COURT: Can you pull it out so I can read it

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1 because I don't recall I read it.

2 Ms. Murray, anything else on behalf of your client?

3 MS. MURRAY: Nothing further.

4 MS. MCCALLUM: I did omit one thing. Mr. Monteleoni
5 pointed it out to me.

6 In addition to the reply with the supplemental
7 forfeiture submission, we also submitted a supplemental
8 declaration from Thomas McDonald.

9 THE COURT: I should have said that. This is
10 Mr. McDonald's supplemental declaration. It's fat. And here
11 is the letter from Mr. Stavis with the attached email, which I
12 am sorry I overlooked. Thank you very much.

13 Has the government reviewed the presentence reports?

14 MS. MCCALLUM: Yes.

15 THE COURT: Any additions, deletions or corrections?

16 MS. MCCALLUM: Aside from those reflected in the reply
17 submitted by the government, no.

18 THE COURT: Let's go through them paragraph by
19 paragraph, report by report. I'm afraid I have to do that.
20 Let's start with Mr. Binday because I'm not going to figure
21 them out on my own.

22 MS. MCCALLUM: They relate only to the loss amounts,
23 your Honor and specifically the commission's calculations.

24 THE COURT: And paragraph? Since I'm forced to
25 calculate loss amounts, do commissions calculations actually

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1 matter?

2 MS. MCCALLUM: Paragraph 35, your Honor --

3 THE COURT: Paragraph 35 of Mr. Binday's presentence
4 report, it doesn't list any commission. Indeed, that was a
5 question that I had for you. It's a little confusing.

6 Are the actual loss figures payouts on policies that
7 have actually been paid out net of premiums paid and net of
8 commissions, or are they just net of premiums paid and the
9 commissions are in addition?

10 MS. MCCALLUM: The actual losses consist of, first,
11 commissions paid out to the defendants and to others in
12 connection with the scheme policies; so that's one portion of
13 the actual losses. The other portion relates to the death
14 benefit losses.

15 THE COURT: Correct.

16 MS. MCCALLUM: So it's death benefits paid out net of
17 the premiums paid on those policies, as well as all premiums
18 paid on lapsed scheme policies for which no death benefits were
19 actually paid out.

20 THE COURT: You have just subtracted them willy-nilly
21 from policies as to whichever death benefits were paid out?

22 Is that correct?

23 MS. MCCALLUM: Essentially, your Honor, we took the
24 collection, the universe of scheme policies, and any policy
25 within the scheme policies that has terminated, so it has

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1 either resulted in a death benefit or a lapse.

2 THE COURT: Death benefit or a lapse.

3 MS. MCCALLUM: We have netted out all premiums paid on
4 any lapsed or paid out policies.

5 THE COURT: There's no death benefit to net out the
6 premiums against an unexpired policy.

7 MS. MCCALLUM: Correct.

8 THE COURT: You have taken that number off the bottom.
9 Is that correct?

10 MS. MCCALLUM: That's right.

11 THE COURT: Thank you.

12 The same correction was made with respect to
13 Mr. Kergil's and Mr. Resnick's, correct, on the actual loss?

14 MS. MCCALLUM: That's correct; yes.

15 THE COURT: Does the government wish to be heard on
16 sentencing?

17 MS. MCCALLUM: Yes, your Honor. May I just stand at
18 the podium.

19 THE COURT: Wherever you would like, Ms. McCallum.

20 MS. MCCALLUM: The Court has informed the parties that
21 it does not intend to --

22 THE COURT: In fact, I'll tell you what I'm going to
23 do because since the time that I informed you I have to and the
24 law requires me to calculate the guidelines, I'm going to use
25 the actual loss numbers that the government has provided me

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1 with in the updated submission from Mr. McDonald, so the actual
2 loss number is something like \$36 million.

3 What I said I was going to do is calculate the
4 guidelines, consider the guidelines, and then sentence in the
5 old-fashioned way, and I still intend to do that.

6 MS. MCCALLUM: Understood. I will focus my brief
7 presentation on the 3553(a) factors.

8 I want to start with the nature and characteristics of
9 the offense. You have volumes of paper in front of you
10 relating to the nature and characteristics of the offense.
11 Your Honor presided over the trial, so I will be brief. I just
12 want to emphasize how calculated and multilayered and brazen
13 the fraud was in which the defendants engaged.

14 They didn't just submit 92 fraudulent scheme
15 applications to insurance companies. They backed up their lies
16 with false accountant reports, bogus inspection reports, fake
17 estate plans, and then in the case of Mr. Bindow, lengthy
18 emails, for example, to Prudential, purporting to specify
19 details of conversations with an insurer that had never
20 occurred.

21 Even worse than backing up their fraud with false
22 documents, the defendants in this case, all three of them,
23 coached senior citizens who were the straw insureds on these
24 policies to lie to insurance companies and they told them what
25 false answers to give to insurance companies.

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1 Then, on top of all of that, all three defendants
2 schemed in one way or another to obstruct justice, to conceal
3 their fraud. In the case of Mr. Binday, he lied under oath
4 before the New York State Insurance Department, he instructed
5 seniors to lie after investigators came calling and he directed
6 Mr. Kergil, Mr. Krupit, Mr. Resnick to destroy documents after
7 learning that the F.B.I.'s investigation had begun.

8 Mr. Kergil and Mr. Resnick, for their part, also
9 schemed to destroy records at Mr. Binday's direction. In the
10 government's view, the nature and the circumstances of the
11 offense here weigh heavily in favor of various substantial
12 terms of imprisonment.

13 Turning to the history and characteristics of the
14 defendants, your Honor has before you a number of good
15 character letters which, of course, must be weighed in the
16 balance. On that front, the government would urge that the
17 Court also consider the character of the defendants as
18 reflected in their actions, and keep in mind that this is not
19 just an isolated event. These are a series of events that took
20 place over many years beginning with fraudulent applications in
21 around 2006 and stretching through to obstruction of justice in
22 2010.

23 Turning to the number of goals of sentencing that are
24 listed, I think it's 3553(a)(2), I want to focus on two of
25 them. The first is promotion of respect for the law. The

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1 defendants in this case exhibited such contempt for the law in
2 their actions through their fraud and then through their
3 actions to cover up the fraud that the government believes this
4 particular goal weighs heavily in favor of substantial
5 sentences.

6 Similarly, the goal of deterrence: These defendants
7 were not deterred by the threat of civil penalties or by the
8 threat that insurance companies might discover their fraud.
9 They were willing to run the risks of those kinds of penalties,
10 lying through their teeth the whole time.

11 They weren't deterred from destroying evidence or
12 seeking to destroy evidence after the FBI began investigating
13 their fraud. And in a case like this where the law has been so
14 brazenly and repeatedly broken, substantial sentences are
15 warranted.

16 Does the Court have further questions?

17 THE COURT: No. You went on at great length in your
18 submissions, for which I thank the government.

19 MS. MCCALLUM: Thank you, your Honor.

20 THE COURT: Let's start with Mr. Binday. Counsel,
21 good afternoon. Have you reviewed the presentence report and
22 gone over it with your client?

23 MR. FRISCH: Yes, we have, your Honor.

24 THE COURT: Aside from your objection to the
25 guidelines calculation, is there any other error in the

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1 presentence report that you need to call to my attention?

2 MR. FRISCH: With the exception of those issues that
3 go to the guideline calculation and loss and economic harm, and
4 also with regard to the two enhancements, obstruction of
5 justice and what I have written about aggravating role, that's
6 it. My understanding of how your Honor is going to proceed is
7 that with regard to the two enhancements, at least, your Honor
8 is certainly going to consider the underlying conduct as you
9 will the entire record --

10 THE COURT: I'll tell you what I'm going to do. I
11 read your arguments. I think the enhancements are warranted.
12 I'll include them in the guideline calculation.

13 This is a perfect example of why the thing should be
14 abolished. They should be gotten rid of: The amount of time,
15 the amount of money, the amount of effort that has been
16 expended arguing the guidelines and how they should be
17 calculated instead of arguing about Mr. Binday is really
18 extraordinary, and, in this case, totally completely
19 unnecessary.

20 The conduct will obviously be taken into account, but
21 I am required by law, as you know, to calculate the guidelines.

22 MR. FRISCH: I understand. But for those things,
23 there are no outstanding objections to the PSR.

24 We brought some minor things, or relatively minor
25 things, to the attention of Officer Thomas. He corrected them

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1 and those things have been taken care of.

2 THE COURT: I will hear you on sentencing, sir.

3 MR. FRISCH: Thank you, Judge.

4 One of the reasons why I think this case is unusual,
5 and I think we probably can all agree that the case is unusual
6 in some respects, is that I think we're unlikely to see this
7 type of particular conduct repeated with any significant
8 frequency in the future, both specifically and certainly
9 generally.

10 The conduct in this case began before and at a time
11 when the various entities involved were responding to STOLI.
12 At least some of the insurance companies at the time or shortly
13 after the conduct began were nominally or otherwise taking
14 steps to protect themselves from STOLI.

15 As your Honor knows, there were laws passed. And, of
16 course, ultimately here, and in a few other cases around the
17 country, the United States Department of Justice planted a flag
18 in the STOLI non-STOLI landscape, which essentially said we
19 don't like this, stop it.

20 Plainly, the government in this case attempted to
21 craft an indictment that would fit this case into a cognizable
22 theory of criminal liability. Your Honor sustained it. The
23 jury found it. Ultimately, the circuit will pass on it. But
24 in no event can the Department of Justice be faulted for trying
25 and possibly succeeding. And that's what the Department of

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1 Justice does in the best scenario in many different kinds of
2 subject matters: They see something they deem worthy of their
3 attention as they did here, something new, and they go after it
4 and they go at it.

5 But where I think the government misses the mark,
6 notwithstanding the government's presentation just now and what
7 they put in writing, how they missed the mark in this case is
8 their conclusion that it's necessary, the only way to respond,
9 you got to do it, you got to impose lots of prison time or else
10 somehow the point isn't made.

11 In my view, not only are the guidelines something that
12 were folly, but I think our current preoccupation with lots of
13 prison time when I say "our," I mean our national preoccupation
14 is also a folly, is counterproductive and doesn't serve
15 anyone's interest, especially in a case like this; though
16 having said that, I'm not saying this a probation case. It is
17 not. There were misrepresentations. There's reason for
18 incarceration to be imposed. The jury and your Honor rejected
19 the defense, but notwithstanding that, I think an overemphasis
20 on lots of prison time in situations like this is part of our
21 national problem in the system in which we all proudly work.

22 I think the government misses the mark for two
23 categories of reasons, one of which is general and one of which
24 is Mr. Binday specific.

25 The general reasons: As I pointed out, the landscape

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1 has changed. We're not going to see this kind of conduct,
2 certainly with any significant degree of frequency, going
3 forward. The landscape is different now than when the conduct
4 in this case began, which is a way of saying general deterrence
5 is not something really that which I believe in this case the
6 Court has to be overly concerned.

7 In addition, and maybe more important, the fraud loss,
8 notwithstanding what your Honor has found as you have to make a
9 finding, that is, the fraud loss happens to be limited as a
10 matter of fact by the theory that the government crafted so
11 precisely and with such care to bring this as a criminal and
12 not a civil case.

13 In its papers, the government talks about things
14 flowing from stealth and proximate result of conduct, and
15 phrases of that sort. They say, for example, in year one, he
16 had these representations; in year five or year ten, you have a
17 \$2 million death benefit, but that's not a
18 criminal-lots-of-prison-theory.

19 This is not a case where a terminally ill senior was
20 presented as robust or that the fact that an insured or a death
21 was fabricated. There are case like that. Those are cases
22 where the calculation the government proposes and the kind of
23 sentence they recommend is properly applied.

24 The criminality here is the economic harm, the right
25 to control, the economic harm difference between STOLI and

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1 non-STOLI; and if that were any significant number, your Honor,
2 I respectfully submit two years into the case, we would have
3 heard about it.

4 That doesn't mean that Mr. Bindow today gets an
5 attaboy or a pat on the back or a hug instead of a prison
6 sentence, but it is prospective as to what we're here to
7 sentence him for, what the crime was and what the government's
8 theory is.

9 General deterrence does not require more than a short,
10 definite period of incarceration. It's the certainty, not the
11 length. That's what the authorities that we cite to the Court
12 say. I don't think it's in dispute. It's the certainty in
13 white collar first offender cases that matters, not the
14 severity, which I submit is not productive.

15 There's no empirical evidence that the kind of
16 sentence sought by the government deters prospective white
17 collar defendants. If a prospective white collar defendant is
18 not deterred by what has happened in this court to date and
19 what will happen in a prison sentence that is not so severe is
20 imposed, it is unlikely that any such person is going to be
21 deterred.

22 Let me turn to Mr. Bindow. If we can agree that a
23 trial is about charged conduct, sentencing is about the conduct
24 in context, the context of who the person is. The letters
25 submitted on Mr. Bindow's behalf are impressive. They're

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1 enthusiastic. They're genuine. There's a goodly number of
2 them. They put the conduct in perspective. It doesn't say no
3 prison, but it cuts against the notion that we have to put him
4 in jail for a long time.

5 A short sentence is going to help him get it to the
6 extent he hasn't already gotten it by having sit in this
7 courtroom today and having sat through the trial.

8 Of the letters, there were more than 20 people, family
9 and friends who are here today, including his wife Karen of 15
10 years, and so many others. These letters speak, your Honor, to
11 long-standing devotion to charitable and civic activities that
12 predate this case.

13 I know what the government's view of Mr. Binday is and
14 his conduct, but the person you're about to sentence gives
15 gloves to homeless people, volunteers as a poll watcher, makes
16 sure that the commission is paid when the person that owes the
17 commission has completely forgotten about it, works for free to
18 help clients, always goes the extra mile, is the person to whom
19 people turn in a crisis, not once or twice, but time and again.

20 So many people in these letters give witness to who
21 Mr. Binday is over so many years, generosity and selflessness
22 in so many contexts, so many times and so many people. The
23 conduct in this case is important. It's why he's being
24 sentenced today. It's why he's going to jail. It does not
25 define him, and it does not require the kind of sentence that

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1 the government proposes.

2 Mr. Bindow is devoted to his two children, who are ten
3 and 12. They're in grade school. There will be collateral
4 damage in this case. That's the way it is. Those of us who
5 work in the system understand that and learn to accept it and
6 understand that our clients and their families have to figure
7 it out. But the fact is, he is an involved father,
8 instrumental to their care as his wife works full-time.
9 They'll figure something out while Mr. Bindow is not there to
10 perform his role, but a measured sentence reflecting who he is
11 in context is what's called for in addition to mitigate his
12 collateral damage.

13 It's in this context that you look at the trial.
14 There's a distinction between capitalizing on industry
15 protocols, which he did, how ever you can say it, whatever
16 adjectives you can use, which is why we're here on the one
17 hand; and on the other hand, intended harm that the carriers
18 would be hurt by this, he didn't believe that. There's no
19 evidence from any of the cooperators whom the government has so
20 thoroughly debriefed or from the government in two years that
21 he intended anything more than the STOLI/non-STOLI
22 differential, even if he intended that and even if that can be
23 quantified.

24 By saying this, I'm not seeking to validate his state
25 of mind. I'm saying there's a difference between imposing lots

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1 of prison, which should be reserved for the right people and
2 the right case at a time when we're putting too many people in
3 jail for too long and it's not helping anyone, and it's not
4 commanding respect for what we do here; on the other hand, a
5 case like this where I believe a more measured sentence is
6 necessary.

7 For today's purposes, the government has established
8 that there is a crime deserving of punishment, but it's not the
9 same as those crimes not limited to theoretical economic harm
10 based on a right to control where the insurance companies did
11 not lose money and perhaps profited.

12 Those sentences are reserved for the more serious
13 crimes, for which first offenders routinely get the kinds of
14 sentences not approaching what the probation department
15 recommends and what the government seeks, less than half of
16 what the probation department recommends, less than a quarter
17 in many cases. I know every case is different.

18 The Court has to fashion the sentence based on the
19 specific facts and offender before it, so it's not instructive
20 to say this person got that and this person got that. Your
21 Honor knows what the sentence options are. My point is, under
22 these circumstances, a severe sentence is more than is
23 necessary to make the point.

24 As infuriating as the underlying conduct may be and
25 the misrepresentations, if anyone has the capacity to benefit

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1 from a certain and measured and relatively short term of
2 imprisonment, it's someone like Mr. Binday with his impressive
3 history of doing so much good in so many different contexts and
4 is so valued by his wife and kids and so many other, as
5 evidenced by the showing here today on his behalf.

6 Your Honor, I don't know if you want me to do this now
7 or later, but in terms of restitution and forfeiture, I want to
8 be heard on those two things. I can do that now if you'd like.

9 THE COURT: Why don't you do it now.

10 MR. FRISCH: With regard to restitution, it seems to
11 me that restitution needs to follow victim loss, which follows
12 the theory of conviction; that is, there's not \$30 million of
13 loss in this case. The loss is the STOLI/non-STOLI
14 differential which hasn't been established, which hasn't been
15 quantified.

16 It may be shocking in a case like this to say that the
17 loss is zero and the restitution is zero, but this is a novel
18 theory, at least it's an unusual theory if novel is not the
19 right word to use.

20 The insurance companies made lots of money. Our view
21 and our calculation is they profited, but it's certainly not
22 \$39 million of loss. It so happens there's no loss and there's
23 no restitution based on the theory that the government so
24 carefully crafted in this case.

25 With regard to forfeiture, I want to make two general

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1 points, but before your Honor took the bench, I had occasion to
2 talk to the government about some last-minute knits we found
3 with the forfeiture calculation. I don't want to burden your
4 Honor with those today.

5 THE COURT: I got to write a forfeiture order. I got
6 to enter a preliminary order of forfeiture while he's sitting
7 in this courtroom.

8 MR. FRISCH: That's what we discussed. I think what
9 we discussed doing is entering the order as-is. For example,
10 there's a \$4 million number in the proposed forfeiture order,
11 which I believe the government now acknowledges can be taken
12 out. Perhaps, it's already been taken out in the copy you
13 have. I don't know.

14 There are some other knits that I don't want to burden
15 you with today, but what I propose, and I believe the
16 government goes along with this, Mr. Monteleoni knows this
17 section number off the top of his head, I don't, but if you
18 enter the preliminary order and we can come back and amend it
19 after we have the opportunity to discuss it, that will satisfy
20 my concerns about the forfeiture order.

21 THE COURT: Okay.

22 MR. FRISCH: I do want to make, however, at least one
23 or two overarching comments about the forfeiture so we can be
24 guided in having those conversations.

25 One is the same as the restitution; that is, I believe

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1 the ill-gotten criminal gain is limited to the theory of
2 criminal liability; that is the difference between STOLI and
3 non-STOLI. All the commissions are not ill-gotten criminal
4 gain because the criminal gain is not the full value of the
5 policies.

6 Put another way, the lion's share of the commissions
7 are not traceable to the fraud, which is the fraud that was
8 charged in the indictment, which is the economic harm right to
9 control theory. I think as we go forward and the parties work
10 together as we may seek to amend the order, that's one issue
11 on which it may be helpful to have the Court's guidance today.

12 The second is the argument we made in our papers that
13 we believe it should be net and not gross, because the
14 underlying activity is legal. It's not a pervasively illegal
15 activity, so we believe that Section 981 that provides for net
16 should be applied. And if that's the ruling, we'll be in
17 contact with the government to discuss adjustment of those
18 numbers accordingly.

19 Let me have one second to make sure I have covered all
20 of the general forfeiture issues that I wanted to cover. I
21 think that's it.

22 To protect the record, the government late last week
23 or last week Wednesday or Thursday gave us a tracing analysis
24 regarding the money in escrow from the sale of Mr. Binday's
25 coop as your Honor will recall. We found some errors in that.

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1 We'll discuss those with the government.

2 If it's net as opposed to gross, there are some things
3 we want to talk to the government about. There are a few other
4 errors or things that are included that shouldn't be included.
5 I state that so it's on the record and I have protected
6 Mr. Binday's interest. But as I say, after your Honor has
7 enters the preliminary order or after everyone has spoken, we
8 can discuss the schedule so if there is to be a proposed
9 amendment, we can do it in a proper fashion. Thank you, Judge.

10 THE COURT: Mr. Stavis, have you reviewed the
11 presentence report and gone over it with your client.

12 MR. STAVIS: I have, your Honor. I do have the
13 additional issue with regard to the managerial role. I
14 addressed it in my papers. That's a finding that your Honor
15 has to make.

16 I have been with this case for four years and I really
17 didn't see any distinction between Mr. Kergil's role and the
18 roles of the others. I didn't see him being able to give
19 orders and others being required to follow orders. I didn't
20 see any kind of structure that your Honor's seen in many other
21 criminal-enterprise type cases, so as I indicated in my papers,
22 I was somewhat shocked, being familiar with the case as I am,
23 to see a managerial role for Mr. Kergil. And that's an issue
24 that's before the Court with regard to the sentencing
25 guidelines, and I know that your Honor wished me to address the

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1 3553(a) factors.

2 Before I did so, I do want the record to be clear that
3 I do join the arguments made by counsel for Mr. Bindow with
4 regard to losses and those general issues that apply to all of
5 the defendants across the board.

6 With that, I will get to the old-fashioned sentence,
7 what your Honor refers to as the old-fashioned sentence. And
8 the old-fashioned sentence is based on the statute 3553(a), and
9 your Honor has to set a sentence that is sufficient but not
10 greater than necessary, as your Honor is aware.

11 I was listening to the government just before your
12 Honor talk about this fraud, quote, "calculated, multilayered,
13 brazen, rampant lies," which they indicated in their written
14 submissions. They said on page 21 "protracted, calculated,
15 extensive scheme to defraud others for their own benefit."

16 Your Honor, all those are nothing more than saying
17 that this is a fraud. The jury has found that this is a fraud.
18 And for this fraud, the government argued to the Court just a
19 few minutes ago that, quote, "very substantial terms of
20 imprisonment are required," very substantial. In their written
21 submission, they refer to, quote, "very heavy sentences."

22 Your Honor, this is a fraud. There are frauds and
23 there are frauds. Bernard Madoff was a fraud. He was
24 sentenced before this Court. About two years ago, I tried a
25 case in front of Judge Sand that was an advanced scheme fraud.

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1 That was nationwide. Victims lost their life savings, many of
2 them. This is not that, your Honor.

3 Some years ago, I was an assistant district attorney,
4 which is unlike an assistant U.S. Attorney, you can get that
5 job right out of law school. And right out of law school,
6 sitting in a complaint room, you learn what a case is worth,
7 your Honor. You learn how to separate the wheat from the
8 chaff.

9 The victims in this case, your Honor, are insurance
10 companies and my client took away their right to control the
11 policies and representatives of those insurance companies,
12 testified concerning lapse rates, concerning actuarial
13 assumptions. There was no human misery in this case. There
14 was a fraud. There were losses. Your Honor has made findings.
15 It's different. Most of these cases were brought as civil
16 cases as I indicated in my submission.

17 Now this is a criminal case. Your Honor has presided
18 over it. The jury has decided it. In terms of deterrence,
19 that sends the criminal case, the criminal prosecution and the
20 fact that people are sitting here to receive their sentences
21 from the Court, that's a clarion call to anybody who would even
22 think of STOLI fraud on an insurance company ever again. That
23 says don't think about it, don't even think about it. That's
24 the portion under 3553(a) where there has to be some context.
25 Not every fraud requires the heaviest sentence, and that's the

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1 context, your Honor, of the offense.

2 I'll turn to the history and characteristics of the
3 defendant. Kevin Kergil - and your Honor has letters and your
4 Honor has received a written submission - he's a dutiful son.
5 I just want to point out while I'm here that standing, in the
6 second row is Mr. Kergil's mother Florence Kergil. Next to
7 Mrs. Kergil is Mrs. Kergil's caretaker Selina Curtain, who has
8 also written a letter to the Court.

9 Ms. Curtain started out as a neighbor of Mr. Kergil's
10 and when she was a neighbor in need, Mr. Kergil was there when
11 her electricity was cut off. There's a letter about that.
12 He's a good neighbor, your Honor, and he does various other
13 things in his community.

14 He is very active in government. Leslie Lawler
15 submitted a letter concerning meetings which is where she met
16 Kevin at the Peekskill Common Council, the work sessions that
17 they would have there and at Our Lady of Assumption Church.

18 Now, it might seem trivial but it just rounds out who
19 he is, but rescuing animals and things of that nature, just so
20 that your Honor should know, it's not I can't possibly sentence
21 him because he helps animals. It's nothing like that, your
22 Honor. It's my job and my role here to fill out who this
23 person is apart from his criminal acts, so I do mention that.

24 Your Honor, the supplementary letter and email which
25 your Honor reviewed on the bench shows the civic-minded

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1 citizen, how he worked with the police to try to clean up
2 Peekskill. If I could just add somewhat, when arrests were
3 made on March 21, 2013, Preet Bharara, the U.S. Attorney in
4 this district, said, and I quote, "Even small towns like
5 Peekskill are not immune from the narcotics trade and the
6 violence with which it is inextricably linked."Mr. Kergil was
7 active in fighting that and assisting in that investigation as
8 the detective has informed the Court.

9 Your Honor, when you want to know who this man is that
10 appears for sentence - he committed crimes, he must be
11 sentenced - you have to take the full measure of the man, your
12 Honor. I think with all of the things, the fact that he would
13 be so dedicated to his elderly mother that he would bring her
14 home to take care of her himself, along with Ms. Curtain, I
15 think speaks volumes about the character of Kevin Kergil. He
16 is much more than the sum of his criminal conduct.

17 If your Honor can consider some sort of a mixed
18 sentence which would allow him to serve a period of home
19 confinement where he could continue to take care of his mother,
20 I submit that that would serve the ends of justice.

21 I do have some specific issues with regard to the
22 judgment and commitment. I don't know if your Honor wishes to
23 hear those at this time.

24 THE COURT: No.

25 MR. STAVIS: Thank you, your Honor.

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1 THE COURT: Thank you, Mr. Stavis.

2 Ms. Murray, have you reviewed the presentence report
3 and gone over it with your client?

4 MS. MURRAY: Yes, I have, your Honor.

5 THE COURT: Aside from the calculations, any
6 additions, deletions or corrections in the report?

7 MS. MURRAY: Aside from anything that I put in my
8 papers, I will go to the 3553 factors.

9 THE COURT: Thank you.

10 MS. MURRAY: Obviously throughout this trial, you
11 didn't get an opportunity to see the side of Mark Resnick that
12 his friends and family knows and I believe the side that is set
13 forth in the letters that I submitted to the Court: A hard
14 worker, a devoted father, a devoted husband, somebody who has
15 had to actually bear the burdens of life more than others
16 because of his wife's illnesses.

17 I actually have one short additional letter from her
18 doctor, which I'll pass up. He previously filled out a
19 questionnaire for us, and I asked if they could write a letter.
20 He's been treating her since 1997. He just confirms the
21 diagnoses that I had put in my papers.

22 THE COURT: It will be filed under seal.

23 MS. MURRAY: I think that Mark comes to light, your
24 Honor, in the letters, particularly from his children. His
25 son, Andrew, who is here in the courtroom, who talks about his

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1 father as Mr. Mom and has fond memories of his father making
2 his lunch in the morning, bundling him out to the bus stop,
3 helping him with his homework.

4 His daughter Michelle, who is unable to be here today,
5 her letter talked about the strongest, most enduring image of
6 her father is of catching her mother. So I do think that there
7 is a very deep and profound family story here that I think
8 speaks so highly of Mr. Resnick and his goodness.

9 The role he played at home I think is matched with the
10 role he played with friends and relatives. There are other
11 letters in there. His brother Kenneth wrote of the role Mark
12 played when Kenneth himself was undergoing extensive, lengthy
13 legal battles in Florida and was suspended from his job without
14 pay, only later to have it reinstated many years later and
15 back-pay provided to him. His sister-in-law Marcy also wrote
16 about the role that Mark has played in helping her in mediating
17 family disputes.

18 This is really, deep down, a decent, kind and
19 thoughtful person. I know this is not the image that was
20 presented at the trial. It may not be the image your Honor has
21 of him, but I want your Honor to see this other side of
22 Mr. Resnick.

23 In the same way that he cared about his friends and
24 relatives, I submit to you he cared about his clients. And
25 they aren't "clients" in quotation marks as the government

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1 writes. These were people he felt strongly about. He has
2 always spoken to me about his love for his clients. I
3 understand there was some foolish and misguided love. I
4 understand that he himself didn't fully appreciate the
5 ramifications of what he was bringing them into, but I truly
6 believe that he operated in this case with a desire to help the
7 insureds that were his clients.

8 You can see it in the emails back and forth where when
9 they wrote to say what's going on with my policy, has it been
10 sold yet, the way that he immediately followed up with them and
11 went to Mr. Binday to find out what was going on.

12 You can see it in the way that he helped the family of
13 Doris Riviere to sell her second policy before her death. And
14 you can see it, and I think most profoundly, at the time when
15 he is being asked to serve threatening letters on Mr. Griffin
16 and he puts a line in the sand and he said no way, I'm not
17 going to be part of that. And I think that speaks wonders of
18 Mr. Resnick.

19 As to the other 3553 factors that I would ask the
20 Court to consider, obviously, the government concedes that
21 Mr. Resnick has the lowest level of culpability here in this
22 case. He's at the very bottom of the pyramid. He didn't
23 devise or organize this. He recruited straw purchasers. He
24 recruited a couple of trustees and he arranged forward some
25 bogus financials, but there was no role in lobbying the

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1 insurance companies to accept these policies; no role in
2 deciding what financial information goes into the policies; no
3 role in selling the policies; no role in preparing life
4 expectancy reports, he never even saw them; no role in lying to
5 regulators.

6 I know that there is an obstruction charge here, your
7 Honor, and I do think it's important to note that even the
8 government concedes with his obstruction, he made a mirror
9 image of his computer, a mirror image that was provided to me
10 and from which I produced thousands of documents, several of
11 which were entered into evidence against him.

12 Finally, your Honor, looking at the issues of
13 deterrence, I think it's worth thinking about what Frank
14 Zimring talks about, which is contingent opportunism when it
15 comes to crime. It's not like there's lots of crime that's
16 bubbling up everywhere that we can stamp it out here and it
17 will come up over here. In fact, there is a lot of crime that
18 is simply contingent on opportunity; it is people who are not
19 stone criminals, but rather people who are presented with the
20 opportunity and fall into it; I submit to you people who
21 deserve a more lenient treatment from the criminal
22 justice system than those who actually devise and invent the
23 crimes rather than falling in on the opportunity.

24 Mr. Resnick is one of those who fell in on an
25 opportunity. He's not a bad person with a penchant for crime.

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1 He's a good man; accordingly, your Honor, he's a person for
2 whom that research has said short, sharp, swift periods of
3 incarceration are far more a deterrent than anything longer.

4 He's also been severely punished enough. He lost his
5 livelihood, his reputation, his finances are in disarray and
6 his health has deteriorated. And I've provided your Honor with
7 recent health reports.

8 I submit nothing will be served by incarcerating
9 Mr. Resnick for a lengthy period of time, and his family and
10 his wife will be especially hurt by any lengthy incarceration.
11 So I would ask that you use the benchmark of *U.S. v. Lebovits*
12 in determining the appropriate sentence here. Thank you.

13 THE COURT: Thank you, Ms. Murray.

14 Anything else from the government?

15 MS. MCCALLUM: Your Honor, I'm not going to reiterate
16 the arguments that we have laid out in our papers regarding
17 loss and everything. I will rest on our papers for those
18 purposes. And also with respect to the other guidelines point
19 which was raised, which was Mr. Kergil's objection to the
20 managerial role enhancement, we have laid out all of the
21 evidence that supports that enhancement. We believe it
22 applies.

23 Just a couple of notes on the number for actual loss:
24 Your Honor was asking what the particular adjustment to
25 paragraph 35 would be. I believe the number that's in there

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1 right now is 36 million. The adjusted number is 38,153,631.

2 THE COURT: I didn't see that in the supplemental
3 sentencing submission.

4 MS. MCCALLUM: It's in the chart, your Honor, that is
5 attached.

6 THE COURT: I went to the chart. Which chart are we
7 talking about now?

8 MS. MCCALLUM: This is attachment AA to Special Agent
9 McDonald's report.

10 THE COURT: Yes, but there are so many different AAs.
11 There's an AA Hancock, an AA Lincoln, an AA MetLife, and an AA
12 Prudential.

13 Is there an AA AA?

14 MS. MCCALLUM: Sorry. It's the first chart, the
15 summary chart, so the first tab, you'll see the summary there.
16 It says "total actual loss." Offsetting premiums on closed
17 policies. And that includes the commissions.

18 As Mr. Bindow's counsel noted, on the forfeiture
19 issue, we do have revised orders of forfeiture because
20 Mr. Bindow submitted to us today an affidavit from his counsel
21 in the LimQuee litigation saying Mr. Bindow has not, in fact,
22 received the \$4 million on that policy.

23 THE COURT: I figured that was going to happen when I
24 read your objection to his objection.

25 MS. MCCALLUM: Right. We have that affidavit. The

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1 government credits that affidavit. We are omitting the
2 \$4 million from that forfeiture order.

3 THE COURT: Do you have orders that you want to hand
4 up that I can sign and read into the record today with the
5 understanding that it's subject to, perhaps, some further
6 discussion between the people at the front table and the people
7 at the back table?

8 MS. MCCALLUM: That's correct. That's what we
9 propose.

10 THE COURT: Okay.

11 MS. MCCALLUM: Shall I hand those up right now?

12 THE COURT: Yes.

13 Mr. Binday, is there anything that you want to say to
14 me before I sentence you?

15 DEFENDANT BINDAY: Yes, there is. Can you hear me?

16 THE COURT: I can, sir.

17 DEFENDANT BINDAY: Your Honor, I stand before you with
18 tremendous remorse and shame. With hindsight, I would have
19 walked away from each and every policy you heard about, but I
20 do not have that luxury. Instead, I am left to dwell on how
21 and to what extent my actions caused harm to colleagues in
22 business and, most of all, to my family.

23 I would like to share with you one small story. One
24 of my clients once came to me and told me he did not want to do
25 estate planning because he had enough money to leave his

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1 children a very substantial inheritance. I told him he could
2 set up a policy that could leave money to charity, which he
3 did.

4 I wish that my sentencing today focused just on those
5 kinds of stories, which I believe are as much a part of my life
6 as the conduct at issue here, but I do not have that luxury
7 either. And I regret what your Honor knows most about me are
8 these STOLI policies. STOLI policies were not all my business
9 and certainly not all my life.

10 All that said, I am truly blessed to have so many
11 friends and family supporting me today. I apologize to them
12 and I apologize to the Court. Thank you, your Honor.

13 THE COURT: Mr. Kergil, is there anything you want to
14 say to me before I sentence you?

15 MR. KERGIL: Yes, your Honor. First, I would like to
16 thank the Court for the opportunity to speak. And I want to
17 tell you about myself, a little bit.

18 Your Honor, I have always helped people in my
19 community and I have spent countless hours of volunteer work in
20 the rescue and fostering homeless and abused animals. I always
21 have assisted the Peekskill Police Department on many
22 occasions. One instance resulted in the federal arrest of
23 major drug dealers in the city. This is still an ongoing
24 federal investigation in Ms. McCallum's office. There is a
25 copy of the press release here. My attorney has it.

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1 This investigation began when I met in my living room
2 with a detective referenced in letter by Mr. Stavis. There was
3 a lot of risk associated with that. There's no need to go into
4 that nor can I expound on it much more than I have.

5 Lastly, I am devoted to my elderly, disabled mother
6 who requires around the clock care and while I'm assisted by
7 see lien a curtain, a devoted and caring home health aid who is
8 here in court with my mother today I am the primary care giver
9 for the other 16 hours. As a result, my mother enjoys the
10 freedom and independence of a home setting as opposed to a
11 nursing institution. I wouldn't have it any other way. These
12 are my life choices, your Honor.

13 In conclusion, your Honor, I ask you to consider that
14 I've been a good person, and done a lot of good things in my
15 life. I would like to ask the Court for leniency in my
16 sentencing, and I thank you for your consideration.

17 THE COURT: Thank you, sir.

18 Mr. Resnick, is there anything you would like to say
19 to me before I sentence you.

20 MR. RESNICK: Yes, your Honor. I just wanted to thank
21 the Court for the courtesy to me during this whole process.
22 Obviously a very tough process for us to go through. I hope
23 you'll take into consideration my wife's health in my sentence.
24 We have been married 34 years and she goes through a battle
25 daily with her illnesses.

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1 I also want to apologize to my family, to my friends
2 and to you, the Court for being part of this. I accept full
3 blame and responsibility for everything that I did. Thank you.

4 THE COURT: As I'm sure your lawyers have explained to
5 you, there are a great many formalities that we have to go
6 through in connection with the imposition of a sentence, so let
7 me begin.

8 I accept and adopt as my findings for purposes of this
9 sentencing the fulsome, and as per my memory, entirely correct
10 description of the scheme perpetrated by the defendants as set
11 forth in the government's principal sentencing memorandum at
12 pages six through 51.

13 Those pages of the government's briefs should be
14 deemed incorporated into these sentencing minutes, and they
15 replace the descriptions of the offense conduct in the three
16 sentence reports, which are necessarily abbreviated.

17 At the trial, the government needed only to prove that
18 these defendants contemplated that their deceit, their lies
19 would cause a victim some economic harm, at least in the sense
20 of depriving the victim of its ability to make an informed
21 economic decision about what to do with its money or its
22 property.

23 Here, the victim insurance companies were indeed
24 deprived of the ability to make a rational, informed decision
25 about whether to insure particular lives based on the patently

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1 false information about named insureds provided by these
2 defendants.

3 They were deprived of the ability to make an informed
4 decision about whether they wanted to deal with shysters,
5 fraudsters, thieves, liars, men of no repute whatsoever, and to
6 pay those individuals massive commissions in the millions of
7 dollars.

8 The government satisfied its burden beyond a
9 reasonable doubt ten times over. I cannot imagine any basis on
10 which these verdicts could or will be overturned. Indeed, I do
11 not think that there is a serious argument to be made on that
12 proposition.

13 These are fraudulent inducement cases. These are
14 policies that would not have issued absent the fraud. These
15 are not cases about the spread between STOLI and non-STOLI.
16 This is business that would not have been written.

17 In terms of calculating the loss amount for guideline
18 purposes, because I have to calculate the sentencing
19 guidelines, the defendants plainly intended that they and the
20 investors they served would profit at the expense of the
21 insurance companies. They caused actual losses of \$38,153,631,
22 consisting of total commissions paid to them on 74 scheme
23 applications, policies that the evidence showed would not have
24 been issued but for the fraud, total death benefits paid on
25 those policies that have settled less the premiums actually

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1 paid on those policies and the premiums on lapsed policies,
2 which, of course, are found money for any insurance company.

3 At that level, the Section 2B1.1 add-on to the base
4 guideline level for fraud, which is seven, is 22 additional
5 points rather than 26 used by probation when calculating
6 guidelines using the government's theory of intended loss.

7 The 22-point enhancement is more than sufficient,
8 especially as I believe it is easy to calculate known not lost
9 to date but difficult to estimate future losses, which shows
10 the time and represents something of a failure of the
11 fraudulent scheme. For that reason, even though I understand
12 that the guidelines embody a preference for intended loss, I
13 favor calculating actual loss, which betters any reasonable
14 estimate by virtue of being tethered in fact.

15 The resulting 22-point enhancement is severe.
16 Calculating the guideline base figure using gain as a proxy for
17 loss would be slightly more favorable to the defendants, but
18 this Court views it as more appropriate to measure the crimes
19 for guideline purposes using losses to victims rather than
20 gains to the defendant.

21 I am unmoved by the argument made by one of the
22 defendants that the government has presented insufficient
23 evidence to establish that all of the applications it refers to
24 as scheme applications were indeed STOLI applications.

25 The trial testimony established beyond a shadow of a

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1 doubt - a standard that the government did not need to meet but
2 that it did meet - that the R. Bindow large case folder was
3 devoted entirely to stealth STOLI applications, and all of the
4 insureds in whose names the scheme applications were submitted
5 to the insurers had files in their name within the large case
6 folder. All or practically all were strawman purchasers as
7 proved at trial or were the subject of one of Mr. Bindow's
8 profit projection charts.

9 Mr. Bindow's assertion that the government's evidence
10 proved too little is, to use the government's own word,
11 ridiculous. As far as I am concerned, probation correctly
12 calculated all of the other enhancements in each of the three
13 defendants' presentence reports.

14 I reject all arguments propounded by the defendants
15 for why such enhancements, particularly those relating to role
16 in the offense and to obstruction, are inappropriate, and I
17 reject them for substantially the reasons articulated by the
18 government in its briefs.

19 Mr. Bindow's total offense level is 35, his Criminal
20 History Category is I, his guidelines range is 168 to 210
21 months.

22 Mr. Kergil's total offense level is 34. His Criminal
23 History Category is I, his guidelines range is 155 to 188
24 months.

25 Mr. Resnick's total offense level is 29. His Criminal

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1 History Category is I. His guidelines range is 87 to 108
2 months.

3 Although I did not elect to calculate the guidelines
4 using intended but actual loss, I feel constrained to address
5 the defendants' assertion that they believed that the insurers
6 would win by issuing these policies. This assertion which
7 underlay the defense that the jury rejected is indeed
8 contradicted by the overwhelming evidence of the lengths to
9 which the defendants went to deceive the insurers.

10 Had they really believed that the insurers would win
11 from issuing these particular policies in these particular
12 amounts on these particular lives, they would have given the
13 insurers true information and let the insurers write the
14 business, pricing it with full knowledge of exactly what they
15 were insuring.

16 In the end, the defendants' argument that they did not
17 intend for the insurers to lose money is no different, and if
18 this be possible, less convincing, than the argument that every
19 Ponzi schemer makes: I never really thought anyone would lose
20 money; I always intended that everyone would be made whole.

21 I am unconvinced.

22 Now, we have just spent a long time discussing the
23 calculation of the sentencing guidelines. This, of course, is
24 the case that proves the idiocy of retaining the federal
25 structure guidelines structure now that the Supreme Court has

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1 belatedly recognized that it is unconstitutional, especially at
2 a time of economic hardships where courts and other government
3 institutions are denying the public basic services in order to
4 save money.

5 It could have saved a lot of time and money - money
6 spent on prosecutors, money spent on agents, money spent by
7 defense lawyers, money spent on me - had we not had to deal
8 with calculating guidelines and arguing about the calculations
9 of the guidelines *ad nauseam* when everyone agrees that the
10 guidelines are unnecessary to the sentencing decision in this
11 case.

12 Any sensible judge with a modicum of experience under
13 his belt would understand immediately that these are serious
14 economic crimes and that the people who perpetrated them should
15 go to jail for a significant period of time without regard to
16 any guideline at all.

17 Having considered the guidelines, it is my belief that
18 the goals of sentencing are best served by sentencing the
19 defendants in the old-fashioned way: Emphasizing who they are,
20 what they did, and how to punish them, and send a message to
21 the industry that this sort of conduct will not be tolerated.
22 I intend to sentence them for the lying, cheating, scheming,
23 thieving, obstructive fraudsters that the evidence showed them
24 to be.

25 The nature and circumstances of the crimes committed

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1 by these three men are and should be the drivers of their
2 sentences. The government's presentation, written and oral,
3 aptly summarized why this crime is as serious as any seen by
4 this Court.

5 Forget about the amount of the fraud loss, whatever it
6 was or will turn out to be; in the end, this was a scheme
7 perpetrated over a span of years, brazen, as the government has
8 correctly characterized it, and characterized by a number of
9 truly horrible behaviors on the defendants' part.

10 Starting with callous disregard for the little people
11 who were the straw purchasers of these policies: Venality,
12 rampant mendacity, the creation of false documents, obstruction
13 of efforts by the victims to ascertain the truth, obstruction
14 of regulators and the government's efforts to learn the truth.
15 It is precisely the sort of criminality that has left large
16 segments of our society convinced that all businessmen are
17 crooks. And many and honest businessman or woman finds himself
18 or herself unable to overcome the entirely undeserved belief
19 that they are disreputable people and that they ought to be
20 subject to disrepute.

21 I heard Mr. Stavis talk about his experience in the
22 New York State Supreme Court as an assistant district attorney
23 in evaluating crimes. I, as he knows, was a judge in the New
24 York State Supreme Court where I quickly learned that I had a
25 somewhat different perception of how to value crimes than did

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1 my colleagues who seemed to think that if there was no physical
2 violence, it was of no harm-no foul. I did not feel that way.

3 These were not victimless crimes. The significant
4 losses that the insurance companies incurred from hanging out
5 on policies they never would have issued but for the
6 defendants' fraud and the hefty amounts that lined the
7 defendants' own pockets make that abundantly clear.

8 The fact that the nominal victims here are major
9 insurance companies does not and ought not lessen the disgust
10 with which we view the defendants' behavior. We, the public,
11 those are us who purchase insurance are in the end the ultimate
12 victims of this type of crime because in the end, we pay to
13 cover the losses of the direct victims, the insurers.

14 At least one of the defendants has argued that he
15 should be excused because he had no legal intent, but instead
16 simply saw a way for those close to him and his customers whom
17 he cared about to profit at the expense of no one. This
18 argument does not resonate with me. Life is more often than
19 not a zero-sum game. As the government rightly points out
20 where there are winners, there also tends to be losers.

21 I have now handled enough STOLI cases, civil and
22 criminal, to believe that society would be much better off if
23 we reverted to the model that served us well for centuries.
24 One could not take a policy on someone's life unless he had
25 what we used to call an insurable interest in that particular

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1 life. Stranger-owned life insurance is a really bad idea. The
2 traditional model would have made stranger-originated life
3 insurance an illegal product, and the stealth arbitrage
4 opportunity that was identified by those whose business it is
5 to exploit money-making opportunities, which is not a crime,
6 would never have arisen.

7 Stealth arbitrage is decried by the government. The
8 governments used to have a way of preventing such opportunism
9 were that the old and tested rules still on the books. But the
10 fact that stealth arbitrage is not a crime, that arbitraging
11 this opportunity that is created by stranger-originated life
12 insurance is not a crime does not mean that you can commit some
13 other crime in order to bring the arbitrage to fruition, and
14 that is what happened here.

15 Nothing in the personal lives of any of these three
16 men undermines my conclusion in this regard. The fact that
17 they are good family men, devoted to the people whose lives
18 intersect with theirs does not move me, neither does any good
19 or charitable work that they may have done using the money they
20 effectively stole from these insurers. For that sort of
21 argument, I fear you have the wrong judge.

22 Using other people's money to do what qualifies as
23 good works by your likes and then suggesting to me that I give
24 you credit for the fact that you didn't use the money to buy a
25 Lamborghini is something that I find and have always found to

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1 be contemptible, especially since all too frequently charity is
2 a means to bolster the esteem in which one is held by others.
3 I'm afraid I don't see any reason why anyone should esteem any
4 of you.

5 Using money honestly earned for charities is to be
6 extolled; using money stolen for any purpose is an affront to
7 the victim who has an absolute right to decide how it ought to
8 be spent.

9 I want to address the argument there is an
10 overemphasis on prison time in cases like this. There are
11 crimes for which a critically important component of sentencing
12 should be to send a message to the community, for the industry
13 that this kind of behavior is intolerable, and to send a
14 message to the community and to the industry that this sort of
15 behavior is every bit as reprehensible as the types of crimes
16 for which I and others like me routinely send poor,
17 disadvantaged persons to prison for dozens of years.

18 It is precisely in cases like this that for too many
19 years there was an underemphasis on prison time. And it is
20 entirely appropriate in my view to redress that underemphasis
21 so that society understands that the guy who steals money while
22 committing fraud and wearing a suit is no better than the guy
23 who steals it, and a whole lot less of it, while wearing a
24 hoodie.

25 Insurance fraud may not qualify as a crime of violence

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1 within the meaning of our sentencing system and that,
2 unfortunately, is why it is all too often punished not with the
3 severity that it deserves.

4 There are other types of violence, and business fraud
5 do violence to the thin tissue of trust that holds us together
6 as a society. We cannot afford this sort of antisocial
7 behavior and the cynicism that people will get away with it
8 that is engendered in our citizenry. Only if white collar
9 crime is punished commensurate with the damage it inflicts on
10 society will citizens actually believe that the law meet metes
11 out equal right to the poor and to the rich, which words are
12 the cornerstone of the judicial oath.

13 The fact that the defendants are forfeiting
14 substantial assets and that they will be subject to significant
15 restitutionary judgments does not militate against a severe
16 incarcerative sentence for each of them. Sadly, I do not
17 believe that the insurers will ever be made whole, so I am
18 unimpressed by the fact that the defendants will have a
19 financial millstone around their necks for the rest of their
20 lives. I believe that they should.

21 Mr. Binday, will you please stand. Under docket
22 number 12 Cr. 152, at a total offense level 35, the Criminal
23 History Category I, I'm imposing upon you a varying sentence.
24 I am remanding you to the custody of the Attorney General of
25 the United States and the Bureau of Prisons for a term of 144

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1 months, and that's per count. All counts to be served
2 concurrently to be followed by a term of three years'
3 supervised release on each count to be run concurrently.

4 I am not imposing a fine. The other financial
5 penalties will be more than sufficient.

6 Are we still operating on the same restitutionary
7 order that I was given with the government's supplemental
8 submission?

9 MS. MCCALLUM: Yes, your Honor.

10 THE COURT: The amount of the restitution that I am
11 imposing upon you jointly and severally with your codefendants
12 is \$39,308,305.63 to the victims of the offenses charged in
13 Counts One through Three, which names addresses and specific
14 amounts are set forth in the schedule of victims that will be
15 attached to the restitution order that I will sign this
16 afternoon. Your liability is joint and several with Mr. Kergil
17 and Mr. Resnick and Mr. Paul Krupit under 11 Cr. 1092.

18 While you are incarcerated, the criminal penalty of
19 restitution will be deducted from your prison wages in an
20 amount equal to \$25 per calendar quarter or 50 percent of your
21 gross monthly earnings if you are in a UNICOR grade one through
22 four program.

23 I also impose upon you a special assessment of \$300.
24 The special assessment is due and payable immediately.

25 Could I have the forfeiture order with respect to

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1 Mr. Bindow. It is hereby ordered that in light of the various
2 whereas clauses contained in pages one through three of this
3 order, and that as a result of the offenses charged in Counts
4 One through Three of the indictment in which you have been
5 found guilty following a trial by jury, a money judgment in the
6 amount of \$13,522,424.64 in United States currency shall be
7 entered against you for which you shall be jointly and
8 severally liable with codefendant James Kevin Kergil to the
9 extent of \$13,522,424.64 and with your codefendant Mark Resnick
10 to the extent of \$12,214,565.

11 As a result of the offenses charged in Counts One
12 through Three of the indictment, all of your right, title and
13 interest in \$1,958,317.83 of what are known in this order as
14 the deposited funds or the traceable sales proceeds are hereby
15 forfeited to the United States for disposition in accordance
16 with the law, subject to the provisions of Title 21, United
17 States Code, Section 853.

18 All of your right, title and interest in an additional
19 \$1,012,078.28 of the deposited funds, the substitute sale
20 proceeds, which taken together with the traceable sale proceeds
21 is known as the specific property, is hereby forfeited to the
22 United States as a substitute asset for disposition in
23 accordance with the law, subject to the provisions of Title 21,
24 United States Code, Section 853.

25 Pursuant to Rule 32.2(b)(4) of the Federal Rules of

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1 Criminal Procedure, this preliminary order of forfeiture as to
2 specific property and money judgment entered at sentencing is
3 final as to you, Michael Binday, and shall be deemed part of
4 your sentence and included in the judgment and conviction
5 therewith. Saying that, I understand that it may be subject to
6 amendment.

7 The specific property shall remain in escrow under the
8 terms of the stipulation and order, and the remaining deposited
9 funds amounting to \$127,615.59 may be released from escrow to
10 Karen Binday upon entry of this preliminary order of forfeiture
11 as to specific property and money judgment.

12 Upon the conclusion of all appeals and related
13 proceedings, the United States Marshals Service is authorized
14 to seize the specific property and hold it in its secure
15 custody and control.

16 Pursuant to Title 21, United States Code, Section
17 853(n)(1), Rule 32.2(b)(6) of the Federal Rules of Criminal
18 Procedure and Rules G(4)(a)(iv)(C) and G(5)(a)(ii) of the
19 Supplemental Rules for Admiralty or Maritime Claims and Asset
20 Forfeiture Actions, the United States shall publish for at
21 least 30 consecutive days on the government's internet
22 forfeiture site notice of this preliminary order of forfeiture
23 as to specific property and money judgment.

24 Any person, other than the defendant in this case,
25 claiming an interest in the specific property must file a

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1 petition within 60 days from the first day of publication of
2 the notice on this official government internet site, or no
3 later than 35 days from the mailing of actual notice, whichever
4 is earlier.

5 This notice shall state the petition shall be for
6 hearing to adjudicate the validity of the petitioner's interest
7 alleged in the specific property, shall be signed by the
8 petitioner under penalty of perjury, and shall set forth the
9 nature and extent of the petitioner's right, title and
10 interest.

11 The government shall send notice to any person who
12 reasonably appears to be a potential claimant with standing to
13 contest forfeiture in an ancillary proceeding.

14 Upon adjudication of all third-party interests, this
15 Court will enter a final order of forfeiture with respect to
16 the specific property pursuant to Title 21, United States Code,
17 Section 853(n) and Rule 32.2(c)(2) of the Federal Rules of
18 Criminal Procedure, in which all third-party interests will be
19 addressed. If finally forfeited to the United States, the
20 specific property shall be applied in partial satisfaction of
21 the money judgment.

22 All payments on the outstanding money judgment shall
23 be made by postal money order, bank or certified check, made
24 payable to the United States Marshals Service, and delivered by
25 mail to the United States Attorney's Office, Southern District

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1 of New York, Attention: Money Laundering and Asset Forfeiture
2 Unit, One St. Andrew's Plaza, New York, New York, 10007,
3 indicating the defendant's name and case number.

4 The United States Marshals shall be authorized to
5 deposit the payments on the money judgment in the Asset
6 Forfeiture Fund, and the United States shall have clear title
7 to such forfeited properties.

8 The Court retains jurisdiction to enforce this order
9 and to amend it as necessary. Upon the entry of this order,
10 the United State Attorney's Office is authorized to conduct any
11 discovery needed to identify, locate or dispose of forfeitable
12 property. I'm signing the order at 4:06 p.m. on this 30th day
13 of July, 2014.

14 Place of incarceration, recommendation.

15 MR. FRISCH: I would ask that you ask or recommend to
16 the Bureau of Prisons that the conditions to qualify for a camp
17 be waived in Mr. Binday's situation and that they make a
18 recommendation that he be designated to the camp in Schuylkill,
19 Pennsylvania.

20 THE COURT: I'm not prepared to make a recommendation
21 that they waive camp conditions. I will recommend Schuylkill if
22 it's possible or something that's in relatively close proximity
23 to Westchester County, New York.

24 MR. FRISCH: I would say, if you're not going to waive
25 the conditions for a camp and not make that recommendation,

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1 that it simply be a facility close to his home.

2 THE COURT: Westchester County, New York.

3 MR. FRISCH: I'd also ask that, as the presentence
4 report notes on page 27, Mr. Binday is a proper candidate for
5 voluntary surrender as he's been completely compliant. He
6 poses no risk of flight or danger.

7 I'd ask that you permit him to voluntarily surrender
8 to the place of designation. If your Honor does that, I would
9 also ask that you set the date of such surrender for a Tuesday
10 when I understand that the facilities are best able and most
11 efficiently to welcome new inmates.

12 THE COURT: Fine.

13 Surrender date, Mr. O'Neill.

14 THE DEPUTY CLERK: November 4.

15 THE COURT: Tuesday. I'm going to take care of the
16 supervised release conditions with all three of them at the
17 same time.

18 MR. FRISCH: One thing we talked about amending or
19 discussing with the government is amending the preliminary
20 order of forfeiture. It seems to me we don't want to let that
21 go on too long in setting a date and some kind of schedule that
22 we submit whatever we're going to submit to you might make the
23 most sense.

24 THE COURT: The usual rule for restitution is 90 days.
25 In fact, that's statutory. I can't see any reason why it

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1 should take more than 90 days to get this done.

2 MR. FRISCH: No.

3 THE COURT: Ms. McCallum.

4 MS. MCCALLUM: The government does not disagree with
5 that.

6 THE COURT: Fine. Let's say it will all be done
7 within the next 90 days.

8 MR. FRISCH: Lastly, perhaps we should do this
9 together or I can do it first, which is to make an application
10 for bond pending appeal and an ultimate stay of execution of
11 the forfeiture order.

12 Would you like me to proceed now with that.

13 THE COURT: No. Let me get everybody sentenced,
14 please.

15 MR. FRISCH: Okay.

16 THE COURT: I'm going to talk to all three of you
17 about the conditions of supervision. Once I get everybody
18 individually sentenced on the other matters, the conditions of
19 supervision are all going to be identical.

20 Mr. Kergil, will you please stand. Docket Number 12
21 Cr. 152, at a total offense of level 34 and Criminal History
22 Category of I, I hereby sentence you James Kevin Kergil to be
23 remanded to the custody of the Attorney General of the United
24 States and the Bureau of Prisons for a term of 108 months on
25 each count to be served concurrently, to be followed by a term

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1 of three years' supervised release on each count to be served
2 concurrently.

3 I'm not imposing a fine. You're required to make
4 restitution jointly and severally with your codefendants in the
5 amount of \$39,308,305.63 and the codefendants include not only
6 Mr. Binday and Mr. Resnick, but Mr. Paul Krupit.

7 You are required to pay a special assessment to the
8 United States of \$400. The special assessment is due and
9 payable immediately. Restitution payments, to the extent not
10 made immediately, will be deducted from your prison wages at
11 the rate of \$25 per calendar quarter or 50 percent of your
12 gross monthly earnings if you are assigned to a UNICOR grade
13 one through four program.

14 In terms of forfeiture, it is hereby ordered that in
15 light of the whereas clauses contained in the order I am about
16 to sign and as a result of the offenses charged in Counts One
17 through Three of the indictment of which you were found guilty
18 following the trial by a jury, a money judgment in the amount
19 of \$15,623,737.64 in United States currency shall be entered
20 against you for which you shall be jointly and severally liable
21 with codefendant Michael Binday to the extent of \$13,522,424.64
22 and with codefendant Mark Resnick to the extent of \$14,315,868.

23 Pursuant to Rule 32.2(b)(4) of the Federal Rules of
24 Procedure, this preliminary order of forfeiture and money
25 judgment is final as to you, Kevin James Kergil. It shall be

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1 deemed part of your sentencing and included in your judgment of
2 conviction. It is, of course, subject to amendment.

3 All payments on the outstanding money judgment shall
4 be made by postal money order, bank or certified check, made
5 payable to the United States Marshals Service and delivered by
6 mail to the United States Attorney's Office for the Southern
7 District of New York, Attention: Money Laundering and Asset
8 Forfeiture Unit, One St. Andrew's Plaza, New York, New York,
9 10007, indicating your name and case number.

10 Upon execution of this order, the United States
11 Marshals Service shall be authorized to deposit the payment on
12 the money judgment in the Asset Forfeiture Fund, and the United
13 States shall have clear title to such forfeited property.

14 The Court shall retain jurisdiction to enforce the
15 order and to amend it as necessary. And pursuant to Rule
16 32.2(b)(3) of the Federal Rules of Criminal Procedure, the
17 United States Attorney's Office is authorized to conduct any
18 discovery needed to identify, locate or dispose of forfeitable
19 property. I'm signing the order at 4:14 p.m. this 30th day of
20 July, 2014.

21 Mr. Stavis, recommendation on the place of
22 incarceration.

23 MR. STAVIS: Yes. Actually, I have two
24 recommendations. With regard to place of incarceration, I
25 would ask that your Honor indicate or reflect on the judgment

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1 of commitment a recommendation to the Bureau of Prisons for a
2 facility nearest to New York, nearest to Westchester County,
3 New York, where Mr. Kergil resides.

4 THE COURT: I will so do.

5 MR. STAVIS: The other, as your Honor may recall from
6 the presentence report, a history of substance abuse for
7 Mr. Kergil. I believe it was in the addendum on page 25 where
8 the probation department was talking about conditions. The
9 probation officer said, and I quote, "We believe the defendant
10 may be at risk for future substance abuse."

11 THE COURT: There's an inconsistency between the
12 probation report and the recommendation where it says "suspend
13 based on low risk of future substance abuse."

14 That is, in fact, not consistent with what appears in
15 the main body of the text of the report.

16 MR. STAVIS: That's correct, your Honor, but what I
17 want to emphasize is, a person can be sober for a period of
18 time, but when you have this disease, you have it.

19 So based on the drug risk analysis on page 25 and
20 Mr. Kergil's history, I would ask your Honor to indicate on the
21 judgment and commitment a recommendation for any drug programs
22 that the BOP offers that he should be permitted to participate
23 in a drug program.

24 THE COURT: I have no basis to recommend the 500-hour
25 program, but I'll recommend any other programs.

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1 MR. STAVIS: Finally, your Honor, the probation report
2 referred to Mr. Kergil as a, quote, "good candidate" for
3 voluntary surrender.

4 I would note that when this adjournment occurred, one
5 of the things that Ms. McCallum wrote to the Court is that she
6 was seeking a longer adjournment for Mr. Kergil to wind up his
7 affairs with regard to his mother's care. The government
8 agreed also to voluntary surrender.

9 I would ask the Court for Mr. Kergil to have an
10 opportunity to surrender at the facility that he is designated
11 to. I would request that November 4 date as well.

12 THE COURT: The same surrender date, November 4.

13 MR. STAVIS: Thank you.

14 THE COURT: Be seated.

15 Mr. Resnick, under Docket Number 152-03, total offense
16 level of 31, Criminal History Category I, which is also a
17 varying sentence as, by the way, Mr. Kergil's was as well, I
18 hereby sentence you Mark Resnick to be remanded to the custody
19 of the Attorney General of the United States and the Bureau of
20 Prisons for the term of 72 months, to be followed by a term of
21 three years' supervise release. That's on each count. All
22 counts to run concurrently.

23 No fine is being imposed. Restitution joint and
24 severally with Mr. Binday and Mr. Kergil and Mr. Krupit in the
25 amount of \$39,308,305.63, and a special assessment of \$400,

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1 which is due and payable immediately.

2 The restitution amounts will be deducted from your
3 prison wages at the rate of \$25 per calendar quarter or 50
4 percent of your gross monthly earnings if you are assigned to
5 participate in a UNICOR program grade one through four.

6 Ms. Murray.

7 MS. MURRAY: Yes. I would ask that you recommend that
8 he be incarcerated at Otisville.

9 THE COURT: I'll certainly make a recommendation for
10 that, and it is the closest facility for all three of the
11 defendants. It's also very crowded.

12 MS. MURRAY: I would also ask for voluntary surrender
13 on the same date.

14 THE COURT: Voluntary surrender, same surrender date,
15 November 4.

16 Be seated. Let me talk to all three defendants about
17 the conditions of supervision when you are released. I forgot
18 the forfeiture. I apologize.

19 It is hereby ordered in light of the whereas clauses
20 contained in this order and as a result of the offenses charged
21 in Counts One, Two and Three of the indictment in which you
22 were found guilty following a trial, a money judgment in the
23 amount of \$14,315,868 in United States currency shall be
24 entered against you for which you shall be jointly liable and
25 severally liable with codefendant Michael Binday to the extent

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1 of \$12,214,565 and with codefendant James Kevin Kergil to the
2 extent of \$14,315,868.

3 Upon the entry of this preliminary order of forfeiture
4 and money judgment, the order is final and the judgment is
5 final as to you Mark Resnick and shall be made part of your
6 sentence and included in your judgment of conviction. It is
7 subject to amendment.

8 All payments on the outstanding money judgment shall
9 be made by postal money order, bank or certified check, made
10 payable to the United States Marshals Service and delivered by
11 mail to the United States Attorney's Office for the Southern
12 District of New York, Attention: Money Laundering Unit and
13 Asset Forfeiture Unit, One St. Andrew's Plaza, New York, New
14 York, 10007, include your name and case number.

15 Upon the execution of this preliminary order of
16 forfeiture and money judgment, the United States Marshals
17 Service shall be authorized to deposit payment of the money
18 judgement in the Asset Forfeiture Fund, and the United States
19 shall have clear title to the forfeited property.

20 I retain jurisdiction to enforce this order and amend
21 it as necessary. Pursuant to Rule 32.2(b)(3) of the Federal
22 Rules of Criminal Procedure, upon entry of this order and money
23 judgment, the United States Attorney's Office is authorized to
24 conduct any discovery even to identify locate or dispose of
25 forfeitable property. I'm signing this order at 4:21 p.m. on

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1 the 30th of July, 2014.

2 The record should reflect that the order of
3 restitution that was included as part of addendum B to the
4 government's supplemental sentencing has been signed.

5 Let's talk about supervised release. Gentlemen, when
6 you are released, you have 72 hours to report to a United
7 States Probation Officer in this district. There are at
8 present probation offices down here moving back into this
9 courthouse and in White Plains at the White Plains courthouse.
10 You have 72 hours to report, and you will thereafter report on
11 a regular basis to a probation officer for a period of three
12 years.

13 During that period of time, you will do everything the
14 probation officer tells you to do, and you will refrain from
15 doing anything that the probation officer tells you not to do.

16 The following conditions of supervision are mandatory
17 for all of you: You shall not commit another federal, state or
18 local crime. You shall not illegally possess a controlled
19 substance. You shall not possess any firearm or destructive
20 device for any purpose whatsoever. You shall cooperate in the
21 collection of DNA, genetic identifying material as directed by
22 your probation officer.

23 You shall obtain and retain legitimate and verifiable
24 employment. You shall not associate with persons who have been
25 convicted of felonies. You shall not be found in places where

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1 criminal activity is being planned or carried out. You shall
2 apprise your probation officer at all times of your address,
3 both your residence and your work address, and you may not
4 change either address without giving advance notice to your
5 probation officer. If there is an emergency, if there's a
6 fire, if there's a gas leak and you're required to vacate
7 premises, you have 48 hours to notify your probation officer.

8 It is my recommendation that you are supervised in
9 your district of residence.

10 Now, I don't imagine that all of the restitution will
11 have been paid by the time you are released from prison and as
12 a result, you will abide by the following special condition of
13 supervision:

14 You shall provide your probation officer during that
15 three-year period with access to any financial information that
16 the probation officer requests. You shall not incur any new
17 credit charges or open additional lines of credit without the
18 approval of your probation officer unless you are in compliance
19 with the installment payment schedule, which requires you to
20 make payment on the restitution at the rate of 15 percent of
21 your gross pretax monthly income commencing 30 days after the
22 date of your release from prison.

23 Assuming that the restitution is not fully paid off by
24 the three of you, by the time your periods of supervision are
25 over, you will find that the United States Attorney's Office

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1 will reduce that to a money judgment, which will subject you to
2 wage garnishment and the like.

3 Mr. Bindow and Mr. Resnick pose a low risk of future
4 substance abuse and the mandatory drug testing condition is
5 suspended.

6 Mr. Kergil, the recommendation was made by probation
7 that you be subject to the mandatory drug testing condition,
8 which means that you will be tested for illicit substances once
9 upon your release and then twice thereafter at random occasions
10 at the direction of your probation officer.

11 It is my recommendation that the defendants be
12 supervised in their district of residence. I am not imposing
13 the warrantless search condition.

14 Anything else in relation to the sentences that I have
15 overlooked?

16 MS. MCCALLUM: Nothing from the government, your
17 Honor.

18 MR. STAVIS: No, your Honor.

19 THE COURT: Michael Bindow, James Kevin Kergil, Mark
20 Resnick, you have a right to take an appeal from the jury's
21 verdict, the judgment of conviction and the sentence that has
22 been imposed upon you.

23 You have a right to counsel in connection with any
24 appeal that you might choose to file and if you cannot afford
25 an attorney, one will be appointed to represent you without

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1 charge.

2 Do you understand?

3 DEFENDANT BINDAY: Yes.

4 DEFENDANT KERGIL: Yes.

5 DEFENDANT RESNICK:

6 THE COURT: Thank you.

7 The government technically has a right to take an
8 appeal from the sentences that have been imposed upon you if
9 the government believes them to be unreasonable. If the
10 government were to elect to file an appeal and you did not do
11 so, you would again have a right to have counsel represent you
12 on appeal and to have a lawyer appointed to represent you if
13 you could not afford to hire one.

14 Do you understand?

15 MS. MURRAY: Yes.

16 MR. STAVIS: Yes.

17 MR. FRISCH: Yes.

18 DEFENDANT KERGIL: YES.

19 DEFENDANT BINDAY: Yes.

20 DEFENDANT RESNICK: Yes.

21 THE COURT: Thank you. We have taken care of that.

22 You have an application, counsel.

23 MR. FRISCH: Yes, it's an application for bond pending
24 appeal.

25 Your Honor certainly knows the standard: It's clear

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1 and convincing evidence that the defendant is not likely to
2 flee or pose danger, and the appeal raises a substantial
3 question likely to result in reversal.

4 THE COURT: The problem is, you know that I don't
5 believe number two.

6 MR. FRISCH: Except that the circuit has interpreted
7 that language as meaning a nonfrivolous claim. And I think
8 there are nonfrivolous claims here.

9 Understanding that I'm standing before the judge from
10 whose decision we're going to be taking appeal, the respective
11 appellate issues include what we see as nonfrivolous in terms
12 of the theory of the case, the economic harm theory, the
13 insufficiency of evidence of contemplated harm, the fact that,
14 in our view - and this was all litigated before your Honor,
15 obviously unsuccessfully - that the Court's instructions
16 permitted a conviction on a no-sale theory in the way that your
17 Honor discussed what the jury could find with regard to
18 economic harm not limited to loss on the company's bottom line.

19 I know we made these arguments to your Honor. That's
20 why it's an appeal. But nonetheless, we believe these are
21 nonfrivolous. We also believe all of that was exacerbated by
22 comments made by the government in summation which talked about
23 how you do business and what makes sense in doing business
24 which further, in our view, made it worse and authorized the
25 jury to find guilt on something other than the specific, narrow

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1 theory of criminal liability that was advanced.

2 We also believe that the Court constructively amended
3 the indictment by permitting the jury to find economic harm on
4 bases other than those four specific types of economic harm
5 that were identified in the indictment without any language
6 like "including the following but not limited to the
7 following."

8 Again, I understand that these are arguments that your
9 Honor rejected. That's why it's an appeal, but nonetheless, I
10 believe these are nonfrivolous issues for appeal. In light of
11 the defendant's complete compliance with the terms of his
12 restriction, we seek bond pending appeal from your Honor and
13 also a stay of the ultimate order of execution pending appeal.

14 THE COURT: Mr. Stavis, Ms. Murray, I assume you're
15 joining in the application.

16 MR. STAVIS: I join in the application.

17 MS. MURRAY: Your Honor, I join in the application.

18 In addition, I believe that Mr. Resnick has additional
19 grounds for reversal here based on the insufficiency of
20 evidence of obstruction with respect to that charge; and also
21 what I consider, which I've argued to your Honor, the improper
22 government testifying to the jury about documents that were
23 obtained by the government in other areas of discovery that
24 were not in the documents that I provided in my production. So
25 they essentially testified to the jury that there was indeed

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1 destruction of evidence, which was never presented at trial. I
2 actually think that will be a fairly strong reversal argument
3 for Mr. Resnick. I also believe that will affect the verdicts
4 on the other convictions that he faced in that case.

5 THE COURT: Ms. McCallum.

6 MS. MCCALLUM: The government strenuously opposes bond
7 pending appeal.

8 Regarding, first, Mr. Frisch's principal argument, the
9 Court's instructions to the jury perfectly echoed Second
10 Circuit precedent, even echoing the language from the very case
11 upon which defendants relied so heavily for their economic harm
12 arguments, that's the *United States v. Shellef* case. There is
13 nothing novel here. There's no nonfrivolous basis for appeal
14 on that ground.

15 With respect to Mr. Resnick, the Court, as you will
16 recall, issued a curative instruction. To the extent there was
17 any prejudice posed by or error in the government's summation,
18 it was cured by that instruction. In any event, that would not
19 impose a standalone basis for bond pending appeal.

20 THE COURT: I'm not going to issue a bond pending
21 appeal. I think I telegraphed that in my earlier remarks. I
22 really do not think that there is a single nonfrivolous issue
23 to be raised on an appeal from these convictions.

24 If you can convince the Court of Appeals that there is
25 something nonfrivolous for the Court to listen to, you are

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1 welcome to make your application there.

2 But as Mr. Frisch noted, these issues have been
3 litigated before me repeatedly. The evidence of guilt in this
4 case simply is overwhelming, simply overwhelming. I see no
5 realistic possibility that there is any issue on which the
6 convictions could be reversed *in toto* or even in significant
7 part.

8 That application is denied. I assume that there will
9 be an application made to the Court of Appeals in due course.
10 There's plenty of time to do that because surrender is not
11 until November.

12 Is there anything else?

13 MS. MURRAY: As the presentence report notes,
14 Mr. Resnick is at this point indigent. It does say that he has
15 no money to pay a fine. He's making no money. He owes huge
16 debts.

17 At this point, he does not have any money to pay for
18 counsel for appeal, so I'm asking if you would appoint me under
19 the CJA Act so I could do his bail pending appeal motion and.

20 THE COURT: So appointed.

21 MS. MURRAY: Thank you.

22 THE COURT: Anything else from the government?

23 MS. MCCALLUM: No, your Honor.

24 THE COURT: From the defendant Binday.

25 MR. FRISCH: No, your Honor.

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1 THE COURT: From the defendant Kergil.
2 MR. STAVIS: No, your Honor.
3 THE COURT: From the defendant Resnick.
4 MS. MURRAY: Nothing further.
5 THE COURT: These proceedings are closed.
6 (Adjourned)

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